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ABSTRACT

This paper addresses application of the Doctrine of Exhaustion of Administrative Remedies (the legal doctrine that a party may not seek judicial relief for supposed or threatened injuries until the prescribed administrative remedies have been exhausted), in relation to cases brought under the Education for All Handicapped Children Act of 1975 (EHA). The study seeks to determine patterns in 95 administrative exhaustion cases dating between 1978 and 1988. The study concentrates on associations among years, court levels, plaintiff types, whether administrative exhaustion was required, which arguments were the most popular and successful in seeking exemption from administrative exhaustion, opinion writing style, and what issues were at stake. The study concludes that the development of EHA case law presents a picture of the exhaustion doctrine as an evolving, generally predictable guide that becomes more valuable as case law in subject-specific areas develops. Three out of five cases receive exemption from exhaustion requirements. While traditional exhaustion law forbids the consideration of the merits of the case prior to deciding whether to admit a case, the merits of these cases often constituted an integral, inseparable part of the decision-making process. Appendices contain over 100 citations to court cases and a copy of the survey form. (JDD)

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THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT OF 1975 AND PATTERNS IN LITIGATION INVOLVING THE DOCTRINE OF EXHAUSTION OF ADMINISTRATIVE REMEDIES: LESSONS FOR EDUCATORS, CHILD ADVOCATES AND ATTORNEYS

A PAPER SUBMITTED TO THE

LEGAL STUDIES PROGRAM

BY

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SPRINGFIELD, ILLINOIS

APRIL 10TH, 1990

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SURVEY HIGHLIGHTS

* Administrative exhaustion was required in only 42.1 percent of the 95 EHA cases studied. State and Federal courts at each level followed this general pattern.

* Courts were more likely to require administrative exhaustion in challenges involving evaluations, placements, transfers and the treatment within placements.

  Courts were less likely to require exhaustion in challenges of laws, procedures and policies.

* Complainants who had previously requested or had taken some part in the administrative hearing process were 20 to 25 percent more likely to be excused from exhaustion requirements, compared to those who never made an attempt.

* Cases involving class action challenges were more likely to be exempted from exhaustion requirements(70 percent) than those involving individuals(57.9 percent).

* Over a 10 year period between 1979-1988, exhaustion requirements were more likely to be enforced in the middle years 1981-1985.

* Futility was the most frequently used, but least successful of all exceptions to administrative exhaustion requirements. Seventy percent of all cases cited a futility exception; but when raised as a single exception, it was eight percent less successful than the two other most used single exceptions of inadequate remedy and irreparable injury.

  Arguments involving combinations of exceptions won exemption from exhaustion requirements more often than single exceptions.

* The longer the discussion of administrative exhaustion questions in opinions, the more likely that exhaustion was required.

* The deeper into an opinion that the administrative exhaustion issue is placed, the more likely that

exhaustion requirements were exempted. In 9.5 percent of the case, merits were discussed prior to deciding whether it was appropriate to hear the case; eight of those nine cases were not required to exhaust administrative remedies.

Appellate level courts were more likely to stray from the tradition of placing exhaustion questions early in opinions.

PART I. INTRODUCTION

The "long settled rule"[1] that a party may not seek judicial relief for supposed or threatened injuries until the prescribed administrative remedies have been exhausted holds a checkered history. In fact, Chief Justice Warren Burger once lamented over a "judicial penchant of honoring the doctrine more in its breach than in its observance."[2] Yet Professor Kenneth Culp Davis has argued persuasively that courts usually apply the doctrine rightly; troubles generally arise only when judges attempt to explain their decisions.[3] This article focuses on patterns in the doctrine's application in cases brought under the Education for All Handicapped Children Act of 1975(EHA).[4] Administrative case law generated by the Act offers some valuable lessons on the application of exhaustion law in response to various issues and

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[1]Myers v. Bethlehen Shipbuilding Corp., 303 U.S. 41 at 47(1938).

The exhaustion doctrine dates back to the advent of the Interstate Commerce Commission in 1887. Burger, Exhaustion of Administrative Remedies, 48 Yale L. J. 980(1939); cited from Schwartz, Bernard, Administrative Law, 3d. ed., p. 742.

[2]Moore v. City of East Cleveland, 431 U.S. 494, 531(1977). See also, Help is Sometimes Close at Hand: The Exhaustion Problem and the Ripeness Solution, 1987 U. of Ill. Law Rev. 547, 628, for an indepth discussion of ambiguities tied to the exhaustion doctrine.

[3]Davis, Kenneth Culp, 4 Administrative Law treatise, Section 25:1(2d ed. 1983).

[4]Pub. L. 94-142, 89 Stat. 773(1975)(codified at 20 U.S.C. 1400 et seq.(1976); see also, 34 C.F.R. 300 et seq..

changing conditions.[5] In particular, it reveals that courts are consistent in their rulings and in the way that they structure their opinions.

The intent of this study is to plot out a few helpful patterns found in 95 EHA exhaustion cases dating between 1978 and 1988.[6] Some decisions that were later modified or reversed were counted along with their higher court decisions;[7] this served the purpose of showing a clearer macro view of how EHA cases are presented and discussed at varying court levels.

Because this study focuses attention on the process of decision-making that goes into the resolution of EHA exhaustion questions, it will not to go into detail about the complicated administrative exhaustion issues surrounding private rights of action and related administrative processes required by other

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[5]Professor Marcia Gelpe suggests that "many administrative law problems are best studied in a specific context." Gelpe, Exhaustion of Administrative Remedies: Lessons from Environmental Cases, 53 George Washington Law Review 1, 4(1985), relying on S. Breyer & R. Stewart, Administrative Law and Regulatory Policy 12(1979).

[6]The list of 95 cases is the result of extensive research aimed at collecting as many EHA cases as possible where the administrative exhaustion issue was raised. This included cases cited in (1) West keynote indexes; (2) the Lexis database; (3) indexing to the Education of Handicapped Law Report; and, (4) skimming reported cases involving general issues related to the education of handicapped children.

[7]This included a total of five opinions originating from two cases.

laws.[8] The EHA is but one of three statutes commonly used in education of handicapped children litigation.[9] Section 1983 of the Civil Rights Act of 1871 provides a "remedial shell"[10] through which private action suits can be brought against the procedural violations of other constitutional or statutory rights.[11] Section 504 of the Rehabilitation Act of 1972 prohibits federally-funded institutions from engaging in discrimination against the handicapped, Section 504 administrative remedies are generally inadequate for individual claims and are rarely used; instead private action suits are the norm. The three statutes are oftentimes cited together in a single case. This study will concentrate on cases balancing on

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[8]For a thorough discussion of these issues and the evolutionary process that courts and Congress have taken in resolving the statutory boundary lines between the three chief competing laws, see: Wagner, Judith W., Educational Rights of Handicapped Children: Three Federal Statutes and an Evolving Jurisprudence, Part I, 17 Journal of Law and Ed. 387-457; Part II, 625-698.

[9]Civil Rights Act of 1871, 17 Stat. 13, codified at 42 U.S.C.A. §1983(1982); Rehabilitation Act of 1973, Pub. L. No. 93-112, §50, 87 Stat, 355, 394, codified as amended at 29 U.S.C.A. §794.

Another statute, the Handicapped Child Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796(1986), codified at 20 U.S.C.A. §1415(f), has also been influential. It restored to seek compensatory relief under §1983 and §504 and seek awards for attorney fees, following the 1984 Supreme Court decision of Smith v. Robinson, 468 U.S. 992, which tried to limit extra-EHA actions. See Educational Rights, Id.

[10]Id, 697.

[11]Id, pp. 392-5; 697.

EHA administrative exhaustion issues.

A flat-file database[12] was used to manage case information. A record was made of each case. Each record contained 89 fields of information[13] loosely grouped into five categories: (1) biographical information(e.g., name, citation, circut); (2) substantive issues (e.g, student transfers); (3) arguments raised against requiring administrative exhaustion and the results; (4) case history(e.g., degree of administrative review completion); and, (5) the structure of the opinion itself. Most fields gave "true/false" or multiple choice answers to make analysis easier. However, there were several fill-in-the-blank questions.

Many combinations are possible with 89 fields of information. This study concentrates on associations between years, court levels, plaintiff types, whether administrative exhaustion was required, which arguments were the most popular and successful in seeking exemption from administrative exhaustion, opinion writing style, and what issues were at stake.

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[12]Reflex, a commercial database featuring cross-analysis between fields of information.

[13]See Appendix B for a sample record form. As with many research projects, compiling information followed an evolutionary path. Fields of information were dropped and added during the collection process.

PART II: EDUCATION FOR ALL HANDICAPPED CHILDREN ACT AND THE DOCTRINE OF EXHAUSTION OF ADMINISTRATIVE REMEDIES.

A. THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT

The passage of the Education for All Handicapped Children Act of 1975(EHA) was both the culmination of a series of education rights advances tracing back to the fifties[14] and a recognition by Congress that most states were not fiscally able to meet the newly recognized rights of children to a free appropriate education.[15] EHA is both a funding statute[16] and a

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[14]See "The Education for All Handicapped Children Act Since 1975," 69 Marquette Law Rev. 51(1985). The Comment cites origins dating back to Brown v. Board of Education, 347 U.S. 483(1954), the creation of the Bureau of the Handicapped by way of amendment to the Elementary and Secondary Education Act of 1966, the passage of the Education of the Handicapped Act of 1970, as well as the landmark cases of Pennsylvania Association of Retarded Children v. Pennsylvania(PARC), 334 F. Supp. 1257(E.D. Pa. 1971), and Mills v. Board of Education,348 F. Supp. 886(D.D.C. 1971) and the resulting passage of Section 504 of the Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 355; codified at 29 U.S.C.A. §794 et seq..

[15]Courts in the PARCS and Mills, Id, cases first carved out the right to a free education. See also S. Rep. No. 168, 1st Sess. 5, reprinted in 1975 U.S. Code Cong. & Ad. News at 1431-2, recognizing the plight of the states, and "Education," Id, at 57-62 for further details.

[16]Eberle v. Board of Education of School District of Pittsburgh, 444 F. Supp. 41(C.D. Penn, 1977), aff. 582 F. 2d 1274(3rd Cir. 1978); Loughran v. Flanders, 470 F. Supp. 110, 113(D. Conn., 1980)

substantive rights statute[17] through which millions of Federal dollars are annually funneled to participating states.[18] In return, states are obligated to provide a free appropriate education in the least restrictive environment possible. The elaborate administrative due process machinery created under EHA to settle disputes are ably equipped to handle many issues affecting individuals. But courts are often preferred for systemwide challenges, cases where there is a distrust between parties or where timeliness[19] is an issue, and where law-related rather than education-related issues are raised.

The EHA is unique among Federal categorical programs, in

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[17]One purpose of the Education for All Handicapped Children Act is to ensure the right of handicapped children to a free appropriate education. School Board of Prince William County v. Malone, 762 F. 2d 1210(4th Cir. 1985).

Before passage of the EHA, there were 2.5 million handicapped children receiving inappropriate education, plus another 1.75 million handicapped children receiving no education, at all. Senator Williams, 121 Cong. Rec. 19486(1975).

[18]It has been estimated that Federal dollars only cover about 12 percent of the total costs for the education of a handicapped child. Second Annual Report to Congress on the Implementation of Public Law 94-142: The Education for All Handicapped Children Act 19(1980).

New Mexico abstained from participation for a number of years. See New Mexico Association of Retarded Citizens v. State of New Mexico, 495 F. Supp. 391(D.N.M. 1980).

[19]Some disputes may take up to three years in administrative hearings prior to reaching a court for review. See Antkowiak v. Ambach, 838 F. 2d 625(2d Cir. 1987).

part, because the courts have played an increased role in carving out the statutory entitlement rights. The core of the EHA is the requirement that all handicapped children are entitled to a free, appropriate education, including related services.[20] Rather than providing elaborate definitions of key terms, such as "appropriate education"[21] and "related services,"[22] the EHA created a system whereby definitions evolve through policy development by school officials, through a two-tiered administrative hearing process, and eventually via judicial review. This arrangement is partly premised on the belief that statutory and regulatory guidelines could not adequately cover the individualized needs of each handicapped child. But critics have also argued that Congress simply wished to throw a hot potato into someone elses lap -- leaving judges in the position of oftentimes ordering services that neither school districts or

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[20]"It is the purpose of this chapter to assure that all handicapped children have available to them...a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and parents are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children." 20 U.S.C. §1400(c).

[21]See Laver, Mariam R., Civil Rights - Education of the Handicapped Act(case note), 62 Temple Law Review 429(1989), for its study of the difficulty that courts have had in interpreting what constitutes an "appropriate education."

[22]In Concerned Parents of Malcom X v. N.Y.C. Board of Education, 629 F. 2d 751, 753(2d Cir. 1980), the Second Circut noted that Congress in the EHA failed to define the degree of "change in educational placement" necessary to invoke certain procedural rights.

legislatures intended to provide. Parents and interest groups, in turn, rely on courts to expand the scope of benefits and protections under the ACT. Thus, the issue of if and when the courts will listen to aggrieved parties becomes increasingly important. The reach of their decisions carries far beyond the boundaries of their jurisdiction, frequently affecting service delivery throughout the nation. The potential precedence value of some claims could be delayed, or even lost,[23] should administrative exhaustion be required.

Section 1415 of the EHA requires State Education Agencies(SEA), Local Education Agencies(LEA) and intermediate agencies to establish a series of procedural protections.[24] Under these procedures, parents and guardians are given the opportunity to examine records relating to the child's identification, evaluation and educational placement and relating to the provision of a free appropriate education for their child's behalf.[25] They also have the right to an independent educational evaluation and an Individualized Education Plan(IEP)

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[23]Claims may be vindicated at the administrative level and never rise to the spotlight of attention provided through court opinions. Some disputes may never be brought before administrative hearings, because the claimant may feel that the process is too unfair or too lengthy to be worth the attempt.

[24]20 U.S.C.A. §1415(a).

[25]20 U.S.C.A. §1415(b)(1)(A).

for the child,[26] as well as the right to prior notice in their native language[27] of proposed changes of any of these elements, including agency refusals to make changes.[28] And most consequential for this study, parents and guardians have a right to raise complaints about any of these elements at an impartial due process hearing, with appeal rights to an impartial review by a SEA hearing officer, followed by civil action in either state or federal court.[29] Courts are given the power to "grant such relief as the court determines is appropriate."[30]

Parties appearing at an administrative hearing are offered a wide range of familiar procedural protections. These include the rights to be accompanied and advised by attorneys and experts on handicapped issues,[31] to present evidence, to confront, cross-examine and compel the attendance of witnesses, [32] to verbatim records of hearings,[33] and to written findings of facts and

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[26]20 U.S.C.A. §1415(b)(1)(A).

[27]20 U.S.C.A. 1415(b)(1)(D).

[28]20 U.S.C.A. §1415(b)(1)(C).

[29]20 U.S.C.A. §1415(b)(1)(E) and §1415(b)(2). The vast majority, however, prefer Federal court action. Fewer than 12 percent of the cases under study began at the state level.

[30]20 U.S.C.A. §1415(e)(2).

[31]20 U.S.C.A. §1415(2)(d)(1).

[32]20 U.S.C.A. §1415(2)(d)(2).

[33]20 U.S.C.A. §1415(2)(d)(3).

decisions.[34]

Despite the convenience, cost-savings and rich procedural protections offered through the EHA administrative process, many parents and guardians prefer settling disputes in the courts. Even Congressional sponsors of the EHA were aware that the contemplated hearing process could not be all-encompassing.[35] Sometimes complainants believe the administrative process is stacked in favor of the education system.[36] Sometimes they seek a speedier resolution.[37] And sometimes they believe that the

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[34]20 U.S.C.A. §1415(2)(d)(4).

[35]This sentiment was expressed by Senator Harrison Williams, a principal sponsor of the EHA during Senate floor debates:

"Mr. President, with regard to complaints, I want to underscore that exhaustion of the administrative procedure established under this part should not be required for any individual complainant filing a judicial action in cases where such exhaustion would be futile either as a legal or practical matter. Nor is it intended that the availability of these administrative procedures be construed so as to require each member of the class to exhaust such procedures in any class action brought to redress an alleged violation of the statute." 121 Cong. Rec. 37,416(1975). See also Armstrong v. Kline, 476 F. Supp. 583, 602(E.D. Pa. 1979); Medley v. Ginsberg, 492 F. Supp. 1294, 1309(S.D. W. Vir. 1980).

[36]Studies of the IEP process indicate that parents and guardians are often patronized or treated as adversaries, they often appeared without representation, and won at the LEA hearing level as seldom as 35 percent of the time. See Kuriloff, Peter J., Is Justice Served by Due Process Affecting the Outcome of Special Education Hearings in Pennsylvania, 48 Law and Contemp. Probs. 89, 99(1985).

[37]e.g., seeking speedy redress in the challenge of a child's change in educational placement caused by suspension or transfer.

disputed issues can only be resolved in a judicial forum.[38] Courts decide whether to hear these cases based upon consideration of a number of factors, including application of the Doctrine of Exhaustion of Administrative Remedies, which balances complex interests to determine outcome.

B. EXHAUSTION OF ADMINISTRATIVE REMEDIES

1. THE DOCTRINE

The Doctrine of Exhaustion of Administrative Remedies(exhaustion law) does not govern whether courts have jurisdiction, but whether they wish to exercise jurisdiction.[39] This makes the reliance on the exhaustion doctrine more discretionary, more vulnerable to conflicting signals,[40] but also more responsive to meeting the needs of individual cases.

On a familial plane, exhaustion law is closely linked to the doctrines of Primary Jurisdiction and Ripeness, which also govern questions of timing and decision-making powers between agencies and courts. Primary Jurisdiction, the nearest kin to exhaustion

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[38]e.g., the interpretation or striking down of laws.

[39]Association of National Advertisers, Inc. v. FTC, 627 F. 2d 1151(D.C. Cir., 1979).

[40]For an indepth discussion of the ambiguity surrounding the exhaustion doctrine, see Help is Sometimes Close at Hand: The Exhaustion Problem and the Ripeness Solution, 1987 Univ. of Ill. L. Rev. 547-628.

law, determines which of two tribunals, both having jurisdiction, should act first; while the exhaustion doctrine governs the timing of administrative review.[41] Both doctrines are frequently cited together,[42] and distinctions are often blurred. The Ripeness Doctrine, which limits judicial review to administrative decisions that are is sufficiently "ripe" or finalized,[43] is also occasionally raised at the same time.[44] Exhaustion law, though, is sometimes raised in arenas where it arguably does not belong. In EHA cases where no administrative action has yet taken place or in cases where the issue is allegedly inappropriate for an administrative setting(inadequate remedy), the question is more whether the doctrine applies than how. The doctrine of Primary Jurisdiction may be more relevant in these, yet the analysis is often coached in exhaustion doctrine language, in part perhaps, because that was the framework in which the

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[41]Davis, Kenneth Culp, Administrative Law and Government, 84(2d ed., 1975).

[42]Among the EHA cases studied, see Ezratty v. Commonwealth of Puerto Rico, 648 F. 2d 771, 774, note 4(1st Cir. 1981); Stock v. Massachusetts Hospital School; New Mexico Association for Retarded Citizens v. State of New Mexico, 850, note 6 , supra note 13 , 452, 4; Mrs. W. v. Tirozzi, 732 F. 2d 748(2d Cir. 1987).

[43]Davis, supra note 3, Section 25:1.

[44]Among the cases studied, see Monahan v. State of Nebraska, 687 F. 2d 1164(11th Cir. 1982); Catlin v. Ambach, 644 F. Supp. 121(1986); Seleyo v. Drury, 508 F. Supp. 122, 127(S.D. Ohio 1980); Oster v. Boyer, CV 77-0348(D.R.I., 1979); Andrew H. v. Ambach, 600 F. Supp. 1271(1980); H.R. v. Hornbeck, 524 F. Supp. 215, 218(D. Md. 1981); Vermont Association for the Learning Disabled v. Kaagan, 1983-84 EHLR DEC. 554:447(D. Vt.1984).

argument was raised by defendants.

2. RATIONALES

Although courts differ on the application of exhaustion law, its underpinning rationales are almost universally accepted.[45] In fact, Gelpe asserts they are so persuasive that even if given the option of immediate court access, many aggrieved parties

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[45]Ezratty v. Commonwealth of Puerto Rico, supra note 42 provides a concise review of the rationales behind the Doctrine of Exhaustion of Administrative Remedies.

> "(The doctrine) allows the agency to develop a factual record, to apply its expertise to a problem, to exercise its discretion, and to correct its own mistakes, all before a court will intervene. Insofar as specialized administrative understanding is important, the doctrine thereby promotes accurate results, not only at the agency level, but also by allowing more informed judicial review. By limiting judicial interruption of agency proceedings, the doctrine can encourage expeditious decision-making. Insofar as Congress has provided that an agency will decide a matter in the first instance, to apply the doctrine normally furthers specific Congressional intent. And, as a general matter, the doctrine promotes a sensible division of tasks between the agency and the court.: Litigants are discouraged from weakening the position of the agency by flouting its processes, while court resources are reserved for dealing primarily with those matters which could not be resolved administratively. Thus, the doctrine serves interests of accuracy, efficiency, agency autonomy and judicial economy. 3 K. Davis Administrative Law Treatise, Sec. 20.01 et seq.(1958 & Supp. 1965 & Administrative Law of the Seventies); L. Jaffe, Judicial Control of Administrative Action 424-458(1965); Fuchs, Prerequisites to Judicial Review of Administrative Agency Action, 51 Ind. L. J. 819, 859-69(1976)."

would still prefer the administrative route.[46] Lower costs, speedier decision-making, simpler procedures and greater ease of self-representation make the administrative process attractive.[47] But while these may be effective in dissuading many complainants from seeking early judicial relief, courts often note additional rationales influencing their administrative exhaustion decisions. These include the benefits of agency expertise, record-building, maintenance of agency autonomy, judicial economy, and the right of agencies to correct their own mistakes. Fringe exceptions include the maintenance of Separation of Powers of the government branches and the promotion of democratic values.[48] These collective rationales, Davis argues, must in turn be weighed against competing factors which push toward exemption from administrative exhaustion requirements.[49]

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[46]Gelpe, supra note 5, pp. 10-14.

[47]Id, p. 10.

[48]Gelpe, supra note 5, pp. 10-24.

[49] Davis relates to this process in terms of a tug of war, where judicial discretion rather than law determines results.

> "Exhaustion law is too complex for a meaningful simple statement of when exhaustion is required and when it is not, but clearly the courts generally do what they obviously should do -- they weigh the reasons pulling in each direction and decide whether requiring exhaustion is desirable..."
>
> "The main reason that judicial discretion rather than law is the basis for most litigated questions about exhaustion is that the factors pulling each way are usually plural, each is usually a variable so that the question is not its presence or absence but the degree of its strength or weakness, the combination of degrees of factors pulling one way must be

Yet there has been inconsistency in how the rationales are treated in EHA and other case law.[50] Many courts give them passing reference, citing clumps of rationales together without explaining their relevance to the case upon which they were deciding. Some weigh nameless rationales against arguments for exemption, or omit any mention of rationales altogether. Others invested a great deal of time explaining why certain rationales are important to the cases at hand. When this occurred, the two rationales most cited were deference to agency expertise and the importance of record building.[51]

Agency expertise is perhaps the strongest rationale supporting the exhaustion of administrative remedies in EHA litigation. Courts generally give deference to education authorities when complex education of handicapped children issues arise. There are two central reasons for this. First, school

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weighed against combinations pulling the other way, and the court is typically limited to deciding on the basis of preliminary impressions." Davis, supra note 3, p. 414.

[50] While exhaustion discussions, including discussions of rationales, ranged widely between a single paragraph to several pages-long, there is a corollary between length and likelihood of plaintiff success. The longer the discussion, the higher the exemption rate. See Table 7.

[51] Among the cases studied, see Brandon E. v. Wisconsin Department of Public Instruction, 595 F. Supp. 740, 4(E.D. Wis. 1984), citing Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690(1982); Tracey T. v. McDaniel, 610 F. Supp. 947(D.C. Ga. 1985)(Case centered on burden of proof where no administrative record was in place; exhaustion not discussed, but also not required.).

authorities, and especially hearing officers, are recognized as experts on education issues;[52] if the issues raised in an action are outside a hearing officer's scope of expertise or if there are doubts of hearing officer's own expertise, then this rationale would carry lesser weight. Secondly, the factual issues in each case are so different that courts would be hard pressed to make decisions based upon stare decisis.[53]

Courts have generally given a wide berth to agency expertise in cases involving the education of handicapped children. In the pre-EHA case of San Antonio School District v. Rodriquez,[54] the Supreme Court cited the appellant's specialized knowledge in determining the appropriateness of homebound education of a handicapped child as a reason for requiring administrative exhaustion. In Board of Education of the Hendrick Hudson School

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[52]Infra note 45.

[53]Gelpe, supra note 5, argues that the "factual determination/expertise" rationale works strongest when (1) expertise is needed to analyze new factual issues, and (2) when the agency is recognized as an expert over the issues presented. The expertise argument is particularly strong in EHA cases, in part, because of the complexity of issues and the individuality of each IEP. Gelpe also noted that some decision-makers are not as expert as others(e.g., elected zoning board members may have no expertise at all,thus negating the influence of this defense).

[54]San Antonio School District v. Rodriquez, 401 U.S. 1, 42(1973).

Dist. v. Rowley,[55] the Supreme Court recognized that school authorities held primary responsibility under EHA for formulating policies relating to the education of individual handicapped children and warned reviewing courts against second guessing sound educational policies. Even when an education agency's plans or actions have been determined flawed in some way, courts usually remanded cases for further administrative exhaustion, rather than inject their own opinions. The New York District Court in Shannon v. Ambach[56] implied its reliance on the expertise rationale when it required exhaustion for a challenge of the state's refusal to place a school on its "approved school" list.[57] Yet there may be grey areas where agency expertise may

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[55]"The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child." Board of Education of the Hendrick Hudson Central School District v. Rowley, supra note 43 458 U.S. 176, 207, 102 S. Ct. 3034, 3051, 73 L. Ed. 2d 690.

See also Brandon E. v. Wisconsin Department of Public Instruction, supra note 43, p. 744.

[56]No. CV 81 0460, 3 EHLR 553:198, 199(E.D., N.Y., 1981). Also cited twin interests in record building and allowing an agency to correct its own errors.

[57]For additional cases discussing agency expertise, see Harris v. Campbell, 472 F. Supp. 51(E.D. Vir. 1979)(Unsuccessful challenge of an interim change in IEP to homebound instruction, following several dismissals from residential facilities); Davis v. D.C. Board of Education, 522 F. Supp. 1102(N.D.N.Y. 1981)(after providing declaratory relief, sent back to administrative level on agency expertise and record-building grounds);Brandon E. v. Wisconsin Dept. of Public Instruction, infra note 55 (Cited agency expertise, and specifically the Rowley case, in discussion of rationales supporting the exhaustion doctrine).

not be essential; for example, a dispute over the continued placement of a home aide who was belligerent to the parents might not warrant deference to agency expertise.

Record building is an equally important rationale. Placement challenges and other frequently raised issues often ride heavily upon complicated evidence. This may include medical, psychological and developmental evaluations, studies of available treatment options, plus testimonies from various interested parties. Oftentimes, even if some relief is offered by courts, it is only temporary, pending additional administrative review or the next annual IEP conference.[58] Protracted administrative processes may not be used as an excuse for early court entry, if an insufficient record has been built.[59] However, old records developed over a series of administrative hearings may constitute

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[58] e.g., Colin K. v. Schmidt, 536 F. Supp. 1375(E.D. Ill. 1982). After two state level hearings, even though some evidence was two years-old, there was a sufficient record built to order the LEA's payment for plaintiff child's continued private placement, instead of the LEA's preference. However, because of the age of the record, the court declined to rule on the appropriateness of the current placement, but ordered new IEPs in accordance with directions given by the court.

[59] Without a complete record, and in absence of an indication that the process was inadequate or unavailable, or a showing that officials obstructed the process, court access would not be permitted until the administrative process was completed and a complete record was built. Cluff v. Johnson City School Dist., EHLR 553:598(N.D.N.Y. 1982).

a sufficient record in some cases.[60] Plaintiffs may not be required to exhaust administrative remedies if they are seeking an order to force an appropriate IEP evaluation to be given to ensure that a detailed administrative record is built, so long as the court is not asked to decide on the appropriateness of the disputed placement.[61]

Administrative efficiency is also sometimes cited.[62] When a plaintiff's charges can be vindicated at the administrative level, court time is saved and plaintiffs usually get quicker resolutions.[63] This rationale is also connected to the right of agencies to correct its own errors of decision, policy, practice or rules, which depends in large part upon the adequacy of remedies and whether the issues have been predetermined.[64]

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[60]Colin K. v. Schmidt, supra note 58

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[61]Winfield v. School Board of Fairfax County, EHLR 551:269, 272(Cir. Ct. Vir. 1979).

[62]Laura V. v. Providence School Board, 680 F. Supp. 661(D.R.I. 1981); Shannon v. Ambach, supra note 47.

[63]See Laura V. v. Providence School Board, 680 F. Supp. 66(D.R.I. 1988)(rationale for requiring exhaustion based on possibility that the plaintiffs claims that sought reimbursement for medical expenses could be vindicated at the administrative level); Shannon v. Ambach, EHLR 553:198(E.D.N.Y. 1981)(Court required exhaustion in challenge of an SEA policy, in part, because the SEA commissioner might reverse the policy on appeal).

[64]e.g., Shannon v. Ambach, Id,(Court required exhaustion in challenge of an SEA policy, in part, because the SEA commissioner may reverse the policy on appeal).

Although sometimes quoted in other exhaustion cases, the interest in promoting democratic values[65] is particularly weak and has never been mentioned in EHA exhaustion cases. This rationale is based on the premise that agencies, which are accountable to elected executive officers, are closer to the electoral process and more politically responsive than courts. But in most EHA controversies, administrative hearing officers are required to structure their decisions based upon the individualized educational needs of the child, ignoring most outside economic and social influences. With most issues, insulation from political forces is valued more highly than promoting democratic values; and individual plaintiffs would not likely wield the political influence necessary to affect action.

The interest in protecting the representation of diverse interests[66] is also weak. While outside experts may be brought in, The EHA administrative process limits the scope of parties to aggrieved parents, children and school boards. Outside parties, such as insurance companies seeking reimbursement for education-related bills they paid earlier, have been restricted from both administrative and judicial review on grounds they are not

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[65]Gelpe, supra note 5, pp. 20-21.

[66]Gelpe, supra note 5, pp. 24-25.

"aggrieved" parties under EHA standards.[67] The power of courts to conduct de novo hearings also weakens this rationale, since the same testimony may be heard in either forum.

3. EXCEPTIONS.

Balanced against rationales supporting administrative exhaustion requirements are "exceptions" to the doctrine established through generations of case law. Administrative exhaustion is not required where it would prove futile, where disputes involve issues at law, or where irreparable harm would result if judicial action were delayed by the implementation of the administrative process.[68] Occasionally courts give only vague reference to specific categories of exceptions, or no mention, at all.[69] When exceptions are cited, the two most frequently named are futility and inadequate remedies. Both are frequently cited together;[70] and, in fact, inadequate remedies may be treated as a subset of the broader futility umbrella.

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[67]See Allstate Insurance Co. v. Bethlehem Area School Dist., 676 F. Supp. 1132(E.D. Penn. 1982).

[68]Ezratty v. Commonwealth of Puerto Rico, infra note 34

[69]In Stanger v. Ambach, 501 F. Supp. 1237(S.D.N.Y. 1980), exhaustion was not required prior to the granting of injunctive relief where to do so would not further purposes behind the exhaustion doctrine.

[70] Of the 63 cases citing futility arguments, 15 also had an inadequate remedy defense raised.

Most disputes are settled at the EHA administrative hearing level. However,there are instances where the administrative process cannot provide adequate relief. The EHA hearing process was designed for the proceeding of individual claims, but it cannot respond to class-wide challenges. Hearing officers cannot interpret or strike down state laws; they also arguably cannot change rules, procedures or policies, or correct flawed administrative processes. Resort to administrative hearings in these cases would be futile because the forum is inadequate to provide the necessary relief.

There may also be times, however, when it would be futile to bring even properly raised claims to an administrative forum. Predetermination of a hearing officer(especially at the SEA level) over an issue[71] and stonewalling by an education agency to make a placement or provide hearings are examples of futility arguments. Section II(B) will provide a fuller discussion about the strategies used in EHA litigation to avoid administrative exhaustion requirements.

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[71]See Brandon E. v. Wisconsin Department of Public Instruction, supra note 43 (Exhaustion required where plaintiff claimed that the SEA had predetermined its decision on challenge of its own policy); Mitchell v. Walter, 538 F. Supp. 1111(S.D. Ohio 1982)(Unsuccessful attempt to challenge of alleged SEA predetermination of policy of excluding residential placements from consideration).

PART III. THE SURVEY

A. DISTRIBUTION OF CASES

The 95 EHA exhaustion cases selected for this study spanned a 10 year period. While the small numbers and the uniqueness of each case limited analysis, some useful patterns show through. The most important, of course, was the judicial flexibility courts exhibited in applying the Doctrine of Exhaustion of Administrative Remedies. A large majority of cases were not required to exhaust administrative remedies. Exceptions were recognized in a predictable pattern, and preliminary impressions of merits of each case were often weighed to some degree by courts when making decisions. There were also other notable patterns regarding exceptions to the exhaustion doctrine, court levels, opinion structure and other issues.

Many factors influence how an exhaustion issue is resolved, and even why it's raised.[72] Yet EHA courts have consistently demonstrated a willingness to admit cases for review under a wide range of circumstances. Administrative exhaustion was required in

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[72] e.g., defense attorneys may raise an exhaustion challenge as part of a scattergun procedural attack with little substantive hope of winning the question.

only 42.1 percent of the EHA cases where the issue was raised(See Table 1). Federal district and appellate courts generally followed the same lines, although there were instances of lower courts being reversed. State courts,[73] when grouped together, also followed a similar pattern.

TABLE 1

Exhaustion Outcome by Court

Court	Required	Exempted	Total
Federal Appellate	8(42.1%)	11(57.9%)	19(100%)
Federal District	28(43.0%)	37(57.0%)	65(100%)
State Supreme	1(33.3%)	2(66.6%)	3(100%)
State Appellate	3(50.0%)	3(50.0%)	6(100%)
State Trial	2(100%)	---	2(100%)
TOTAL:	40(42.1%)	55(57.9%)	95(100%)

The relevancy of year-to-year changes could not be demonstrated due to the small numbers, ranging between four and 15 cases annually(See Table 2). A majority of cases decided in a given year were not required to exhaust administrative remedies during seven of those years, a majority required administrative

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[73]The EHA allows redress in either state or federal court, but most plaintiffs choose the latter, even when state laws, regulations and policies are at issue.(e.g., See Monahan v. State of Nebraska, supra note 34 challenging a state procedural law, Fewer than 12 percent of all cases in this study were initiated in state courts.

exhaustion in two of the years reviewed, and in two of the years half of the cases required administrative exhaustion and half did not. However, courts have been less likely to require administrative exhaustion since 1986: Of the 26 cases decided since then, only eight(30.8 percent) required exhaustion.

There was a pendulum effect in administrative exhaustion rates over time. Complainants were less likely to be forced to exhaust administrative remedies in earlier years (1979-1980) and later years(1986-1988). This may indicate a maturing of EHA exhaustion case law. Courts may have been more likely to admit cases during the formative years when issues were first being raised and as litigants attempted to solidify their rights. When the EHA foundations became more firmly set, courts gradually restricted access, enforcing previously established exhaustion boundary lines and encouraging judicial economy by compelling parties to resort to administrative machinery. In 1986, the pendulum began swinging again toward proportionately greater courtroom access and court responses became more predictable, enabling plaintiff attorneys to more accurately gauge their chances of success before a petition is made.

TABLE 2 Exhaustion Outcome by Year			
Year	Required	Exempted	Total
1979	1(12.1%)	7(87.5%)	8(100%)
1980	3(30.0%)	7(70.0%)	10(100%)
1981	8(61.4%)	5(38.6%)	13(100%)
1982	7(46.7%)	8(53.3%)	15(100%)
1983	3(42.9%)	4(57.1%)	7(100%)
1984	7(70.0%)	3(30.0%)	10(100%)
1985	3(50.0%)	3(50.0%)	6(100%)
1986	---	4(100%)	4(100%)
1987	6(50.0%)	6(50.0%)	12(100%)
1988	2(20.0%)	8(80.0%)	10(100%)
TOTAL:	40(42.1%)	55(57.9%)	95(100%)

B. ISSUES AND EXCEPTIONS.

All requests for exemption from administrative exhaustion requirements, regardless of claim, must have substance in order to prevail.[74] Yet some categories were more successful than others(see Table 3).[75] Again, small numbers and the individual

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[74]e.g., the inadequate remedy available to challenge state laws before and impartial hearing officer. See Monahan v. State of Nebraska, supra note 36.

[75]Note that the total number of category cases listed exceed the 95 cases studied. This is because a single case may hold several issues.

character of each case hamper predictions. But a general logic can be found in their ranking.

TABLE 3

Exhaustion Outcome by Issue Raised

Issue	Required	Exempted	Total
Law	1(20.0%)	4(80.0%)	5(100%)
When Exhausted	3(33.3%)	6(66.7%)	9(100%)
Inaction	11(33.3%)	22(66.7%)	33(100%)
Procedure	9(36.0%)	16(64.0%)	25(100%)
Policy	9(37.5%)	15(62.5%)	24(100%)
Predetermined Issue	7(38.9%)	11(61.1%)	18(100%)
Treatment	8(44.4%)	10(55.6%)	18(100%)
Evaluation	6(42.9%)	8(57.1%)	14(100%)
Placement	23(45.1%)	28(54.9%)	51(100%)
Regulations	2(50.0%)	2(50.0%)	4(100%)
Timeliness	8(53.3%)	7(46.7%)	15(100%)
Transfer	6(75.0%)	2(25.0%)	8(100%)

Some issues lay beyond the scope of an LEA impartial hearing officer, and sometimes to a lesser degree that of the SEA hearing officer or commissioner. These include challenges of policies, procedures and laws. On the other end of the scale, challenges to transfers usually involve education or budget-related questions that are better suited to the expertise offered in administrative review. Challenges involving evaluations, placements, and the treatment provided within those placements also fall into this

same realm. Questions of timeliness,[76] inaction,[77] and when an issue has been predetermined[78] fall more heavily on preliminary impressions of case facts supporting each exception, and are therefore more volatile. Questions involving largely procedural issues of when the administrative process has come to an end[79] are issues at law which courts usually answer -- but the answer may be that the administrative process must continue.

Plaintiffs in most EHA cases used traditional arguments in

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[76]e.g., whether lengthy delays in evaluations or a hearing officer's failure to render a decision within statutory time limits justify exemption from administrative exhaustion requirements.

[77]Generally more grievous than the question of timeliness. Circumstances may include a failure to provide the statutorily-mandated notice of appeal rights to parents or an active attempt by defendants to block access to administrative hearing review.

[78]e.g., is it futile to appeal to the SEA hearing level on a placement to a school that the SEA has already removed from its list of approved schools. See Lombardi v. Ambach, 522 F. Supp. 867(E.D.N.Y. 1981(Exhaustion required in challenge of state superintendent's interpretation of a state law that students cannot be placed into schools not on an "approved" list); Shannon v. Ambach, EHLR 559:198(E.D.N.Y. 1981)(Exhaustion required in challenge of a SEA refusal to grant a waiver to allow a placement in an unapproved school).

[79]e.g., whether an SEA hearing officer can remand a challenge back to the local hearing level for the gathering of additional evidence. In the challenge of an IEP in Timms v. Metro School Dist., 722 F. 2d 1310(7th Cir. 1983), the court required administrative exhaustion; in effect, upholding the SEA's order that the case be remanded back to the LEA level for further record-building.

seeking exemption from administrative exhaustion requirements. As Table 4 indicates, futility was the most popular but least successful of the three top exceptions. Inadequate remedy and irreparable injury were exempted from administrative exhaustion requirements 66.7 percent of the time, about 8 percent higher than futility's 58.3 percent rate of exemption.

The high number of futility arguments is partly due to the fact that its scope includes the second most popular category, inadequate remedies. All administrative hearings that are inadequate in redressing claims are also futile to attempt. Over a third of all EHA cases dealing with futility arguments also included inadequate remedy arguments. Another reason for the abundance of futility arguments is that it often assumes a catch-all role for almost any, even marginal, arguments for exemption from exhaustion requirements. Some futility challenges are by their nature more difficult to prove than challenges based on inadequate remedy or irreparable injury. For example, it may be difficult to prove that a SEA hearing officer had a sufficiently discriminatory state of mind concerning a disputed policy to make the administrative process futile on grounds that the issue had been predetermined;[80] on the other hand, it would be relatively easier to prove that administrative remedies are inadequate in challenges involving such issues as damages or questions of law.

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[80]e.g., Shannon v. Ambach, supra note 55.

Irreparable injury[a1] cases usually involve compelling issues requiring immediate, sometimes only temporary relief that is often unavailable at the administrative level. Chances for winning exemption from administrative exhaustion requirements rose slightly to 60 percent when inadequate remedy and futility arguments were raised together,[a2] and exemptions to the exhaustion doctrine were granted more often when all three of the most popular exceptions were raised together.

[a1]e.g., Irreparable injury caused by regression due to a lack of year-round educational services. See Armstrong v. Kline, 476 F. Supp. 583(E.D. Penn.)

[a2]Each defense may be tied to separate acts or omissions.

TABLE 4 Exhaustion Outcome by Exception Raised			
Exception	Required	Exempted	Total
Futility	20(40.1%)	28(58.3%)	48(100%)
Inadequate Remedy	8(33.3%)	16(66.7%)	24(100%)
Irreparable Injury	2(33.3%)	4(66.7%)	6(100%)
Futility & In. Rem.	6(40.0%)	9(60.0%)	15(100%)
All three	---	2(100%)	2(100%)

Although a majority of EHA cases never entered the administrative process prior to seeking judicial relief, 46 percent completed some level(See table 5). This latter group was less likely to be required to exhaust administrative remedies. The first level, where plaintiffs sought administrative relief which was somehow blocked, presented circumstances that went far in supporting futility arguments. Defendants oftentimes caused the blockage.[83] The deciding point often fell on whether judges

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[83]e.g., Kerr Ctr. Parents Assn. v. Charles, 572 F. Supp. 448(D. Ore. 1983; Diamond v. McKinzie, 602 F. Supp. 632(D.D.C. 1985). In Ezratty, supra note 42, The First Circut Appellate Court required administrative exhaustion, despite years of refusal by education officials to provide a due process hearing

believed (1) the act was sufficiently grievous to excuse exhaustion on its own merits, or (2) whether the process demanded to be exhausted could be expected to be fair and open.[84] Those who took part in local and state level hearings were also less likely to be required to exhaust administrative remedies; here, some plaintiffs may have already undergone some administrative review without success, supporting arguments regarding the

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to the plaintiff child.

[84]e.g., in Ezratty v. Commonwealth of Puerto Rico, supra note 42, after an unsuccessful, multi-year attempt to seek administrative relief for a proposed placement, the plaintiff was required to exhaust administrative remedies after the SEA gave assurances that an impartial hearing would be provided.

inadequacy or futility of the process.[85]

TABLE 5

Exhaustion Outcome by Level Completed

Level Exhausted	Required	Exempted	Total
No attempt made	29(50.9%)	28(49.1%)	57(100%)
Requested a hearing	2(25.0%)	6(75.0%)	8(100%)
Local Level completed	3(23.1%)	10(76.9%)	13(100%)
State Level completed	3(30.0%)	7(70.0%)	10(100.0)
Remand	3(50.0%)	3(50.0%)	6(100%)

Individuals who had at least started the process also gained some measure of strength in arguing futility and inadequate remedy claims. Some issues,[86] especially procedural issues involving issues at law, may arise only after the administrative process begins.

Claims that could be shaped into class action suits had a high likelihood of success in avoiding administrative exhaustion

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[85]e.g., challenges of laws and "approved school" lists.

[86]e.g., procedural flaws and interpretations by hearing officers of their scope of powers to grant specific relief.

requirements(Table 6). The EHA hearing process was designed to handle disputes involving the Individualized Education Plans for specific students, not systemwide attacks. The hearing process was never intended to be a remedy for class action suits[87] or disputes involving groups of students.[88] Surprisingly, cases involving groups of students were required to exhaust administrative remedies half of the time; this, however, may be an anomaly reflective of the relatively low number of "group" cases under study.

TABLE 6

Exhaustion by Plaintiff Composition

Composition	Required	Exempted	Total
Class Action	3(30.0%)	7(70.0%)	10(100%)
Group	4(50.0%)	4(50.0%)	8(100%)
Individual	33(42.9%)	44(57.1%)	77(100%)

Another factor pushing towards exemption from administrative exhaustion requirements is found in cases asking the question: "At what point is the administrative process complete?" Although

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[87]e.g., White v. State of California, EHLR 559:191(Cal. App. 3d. 1987); Georgia Association of Retarded Citizens v.McDaniel, 716 F. 2d 1565(11th Cir. 1983); Crawford v. Pittman, 708 F. 2d 1028(5th Cir. 1981); Garrity v. Gallen, 522 F. Supp. 171(D.N.H. 1981).

[88]e.g., Kerr Ctr. Parents Association v. Charles, 572 F. Supp. 448(D. Ore. 1983); Monahan v. State of Nebraska, 491 F. Supp. 1074(D. Neb. 1980).

the small number of "remand" cases split evenly on whether SEA hearing officers could send cases back to the local hearing level for review, other similar cases, especially those involving multi-year placement challenges, often favored plaintiffs' futility arguments that the circle of hearings would be endless.

C. DISCUSSION LENGTH

The length and placement of exhaustion discussions in opinions are strong indicators of outcome. Table 7 shows that the longer the discussion, the more likely that administrative exhaustion will be required. Half of all cases had exhaustion issues discussed in less than a page; the rate for requiring exhaustion for these cases was 33.4 percent, 10.1 percent below the average. Chances for exemption from administrative exhaustion requirements decreased sharply as discussions grew longer, down to 20 percent for discussions lasting more then three pages.

The brief treatment of exhaustion issues in cases exempted from administrative exhaustion requirements is likely due to the results often being so clear cut that judges wasted little time disposing of the question. It also helped to explain why many administrative law critics complain that the exhaustion doctrine lacks clarity. Longer discussions may indicate more substantive

or complicated disputes requiring greater analysis and support for whatever decisions are made. However, when exhaustion discussions in half of all exempted cases end in under four paragraphs, while exhaustion discussions in a majority of cases that required exhaustion continued at least two pages, readers are generally relegated to a table of feast or famine. Both trial and appellate courts followed this pattern.

TABLE 7

Exhaustion Result by Length of Discussion

Length	Required	Exempted	Total
One Paragraph	4(22.2%)	14(77.8%)	28(100%)
Two Paragraphs	1(11.1%)	8(88.8%)	9(100%)
Three Paragraphs	---	6(100%)	6(100%)
Four Paragraphs	1(25.0%)	3(75.0%)	4(100%)
Five Paragraphs	---	1(100%)	1(100%)
One Page	7(58.3%)	5(41.7%)	12(100%)
Two Pages	7(43.7%)	7(56.3%)	16(100%)
Three Pages	7(63.6%)	4(36.4%)	11(100%)
Four Pages	5(71.4%)	2(28.6%)	7(100%)
Five + Pages	3(100%)	---	3(100%)

D. DISCUSSION PLACEMENT

Most EHA exhaustion discussions occurred at or near the beginning of an opinion, prior to the discussion of merits of cases(See Table 8). This follows the premise that prelininary

impressions of the merits of a case should not be considered prior to deciding whether the case should be heard. According to Davis, judicial treatment of merits in exhaustion cases can be divided into three broad categories.

> "(1) They decide the merits first and thereby render their decision later consideration of the exhaustion question meaningless. (2) They silently assume that they must exhaust the exhaustion question before they consider the merits, and they act on that assumption. (3) They allow their decision of the exhaustion question to be influenced by their preliminary impression of the merits, usually concealing such influence but occasionally acknowledging it."[88]

Davis maintains that the first category is the most incongruent to exhaustion law, since a court is essentially deciding the merits of a case before asking whether it's proper to make the decision.[89] Again, the exhaustion doctrine at its most fundamental level requires courts to abstain from the consideration of merits of the case prior to settling exhaustion questions.

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[88]Davis, supra note 3, pp. 417-119.

[89]Davis, supra note 3, p. 418.

TABLE 8

Placement of Exhaustion Issue in Opinion According to Court

Court	Beginning	After other Procedures	After Merits	Total
Fed. Appellate	10(52.6%)	6(31.6%)	3(15.8%)	19(100%)
Fed. District	43(66.1%)	17(26%)	5(7.9%)	65(100%)
State Supreme	1(33%)	2(66%)	---	3(100%)
State Appellate	4(66.7%)	1(16.7%)	1(16.7%)	6(100%)
State Trial	1(50.0%)	1(50.0%)	---	2(100%)
Total	59(62.1%)	27(28.4%)	9(9.5%)	95(100%)

EHA cases have occasionally followed this incongruent line. There were nine cases(9.5 percent) where the merits of each case were discussed prior to arriving at an administrative exhaustion decision.[91] Another 27 cases(28.4 percent) discussed other procedural issues prior to arriving at the exhaustion question[92]. Most EHA "merit first" cases, of course, were excused from exhaustion requirements(85.2 percent), because of the irrationality of finding for the plaintiff while refusing to grant remedies because of a failure to exhaust administrative

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[91]These cases follow much the same line as McKart v. United States, 395 U.S. 185(1969), where the petitioner was found to be exempt from military service, the central issue, prior to the holding that administrative exhaustion was not required.

[92] Although not strictly infringing on the doctrine itself, this flow implies that courts felt other issues were equal or superior to the exhaustion question.

remedies.[93] Cases which discussed other procedures first were also more likely to be exempted from administrative exhaustion requirements(77.8 percent), while traditional discussions at the "beginning" were less likely to be exempted(42.4 percent, or 15.5 percent below average). In short, the further into the body the exhaustion question is discussed, the less likely that administrative exhaustion will be required. First, the discussion of merits of the case prior to the exhaustion question logically implies that the latter issue has already been decided in favor of the plaintiff; and second, the choice of burying the exhaustion question deeper into the opinion suggests that the issue was weak, or at least not as important as the other issues preceding it in the discussion.

Certain court levels were more likely to depart from the traditional placement of exhaustion discussions at the beginning

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[93]In Phipps v. New Hanover County Board of Education, 551 F. Supp. 732(E.D.N.C. 1982), the plaintiffs, seeking an injunction to require the school district to provide Summer school, won on merits that Summer school was likely necessary, but then lost on exhaustion grounds. In weighing the forces pushing for and against administrative exhaustion, the court decided for the former on three grounds: (1) the court was less qualified to deal with the factual issues of the children's educational needs; (2) the timeliness problems associated with getting the Summer school in place in time were chiefly caused by the plaintiffs; and, (3) the EHA was the proper forum for issues regarding classroom content. pp. 736-7.

of opinions(See Table 8).[94] Appellate courts at both the state and Federal levels were more flexible in their structuring. They were more likely to precede exhaustion discussions with other issues, and they were much more likely to discuss merits first. This may be partly due to the fact that the merits of the case may have already been discussed at the trial level. Whatever the reasoning, appellate judges tended to feel more free in arranging exhaustion discussions to suit their priorities -- contrasting with the trial courts more rigid adherence to doctrinal expectations.

When looking at Davis' second and third categories of merit consideration, waiting until after deciding on the exhaustion question and allowing the exhaustion issue to be influenced by

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[94]In Hurry v. Jones, 560 F. Supp. 500(D. R.I. 1983)for example, a Rhode Island district court tipped its hand in dicta before tackling the exhaustion issue when it stated that the plaintiff's charges of education were "clearly...supported by the evidence."

The court in New York Association of Retarded Citizens v. Carey, 629 F. 2d 751, 753(2d Cir. 1980) also discussed case merits first. In NYARC, a class action suit was initiated in behalf of mentally retarded children who were suddenly removed from public schools after the school board learn they were carriers the hepatitis B virus. Although the district court initially laid out jurisdiction, inter alia, via Section 504, EHA and a earlier consent decree, it waited until near the end of it's opinion to hit the exhaustion issue raised by the defendants. The main body of the text centered on whether the school board's actions were discriminatory. Only after finding that the risk of infection did not justify exclusion from public school, did the court turn to the question of exhaustion, which was decided in favor of the plaintiffs.

merits of the case, there was evidence that many EHA courts were influenced by the merits of cases. There were 31 cases(32.6%) where merits were at least implicitly considered before arriving at a decision on the exhaustion question.[95] This total was based on a somewhat subjective reading of cases. For example, many cases involving issues of irreparable injury[96] or timeliness dealt with circumstances tied to both exhaustion and merit questions. Even if this only indicates the potential that the preliminary impressions of merits of the case have in influencing exhaustion question results, it shows the importance

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[95]The court in Andre H. v. Ambach, 104 F.R.D. 606(S.D.N.Y. 1985) tied case merits directly to the exhaustion question.

""Andre H. alleges that the procedures set forth under the EHA have not been instituted at(the) Spofford (juvenile center). Thus the question of adequacy of the procedures for purposes of the exhaustion requirement is the same question raised by the merits of plaintiff's case and falls squarely within this traditional exception (inadequate remedy) to the exhaustion doctrine." Id, p. 10.

In Harris v. Campbell, supra note 52, the court required administrative exhaustion after noting that the plaintiff's central claims of receiving no education services whatsoever were without merit.

[96]In New York Association for Retarded Citizens v. Carey, Id, pp. 484-5, a class action suit was brought challenging the emergency removal of handicapped students carrying Hepatitis B virus from their school. Case merit issues included the existence and degree of "change in placement," which were factors in the court's finding the potential for irreparable injury.

In Armstrong v. Kline, supra note 75, which attacked a state law limiting education to 180 days, the court was asked to weigh the potential for irreparable injury faced by handicapped students who needed year-round education to avoid losing skills already learned.

of courts discussing the influence of cases merits when it occurs. According to Davis, except the need to avoid over-generalized opinions, "reform on this subject [courts acknowledging in opinions that impressions of merits of the case do influence decisions] may be more promising than any other facet of exhaustion law."[97] Avoiding recognition of the influence that merits of the case have over administrative exhaustion decisions results in misleading opinions.[98]

Cases where the preliminary impression of cases merits were implied by the subject matter, but never openly discussed prior to the exhaustion issue, had a much lower success rate in avoiding administrative exhaustion requirements than "merits first" cases; but they held approximately the same exemption rates as the overall average. Federal district(36.9 percent) and state level courts(33.3%) courts were about twice as likely to

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[97]Davis, *supra* note 3, Section 26:2.

Davis also stated: "In many circumstances courts do and should get an impression of merits before deciding exhaustion questions. They should give themselves the freedom to do so in all circumstances, and, across the board, they should acknowledge they do so. After all, a court's view of the merits is sometimes a necessary ingredient of the exhaustion decision..." Id

[98]"Courts do in fact take into account their preliminary impressions of the merits in deciding the exhaustion question, but they usually avoid an acknowledgment that they do so. One who takes the opinions at face value are often misled; courts should not mislead those who need to predict what a court will do. Id, pp. 420-21.

handle cases where case merit influence was implied as Federal Appellate courts(15.8 percent). While all courts followed similar writing styles in exhaustion discussion lengths, they diverged here, perhaps, in part, because judges in the more numerous trial level cases were closer to working with case facts. Appellate courts were more likely to consider the merits of a case prior to disposing of exhaustion questions, but trial courts were more likely to cite the influence of case merits in arriving at their exhaustion decisions. Depending on viewpoints, trial judges may either feel more accustomed in working with case facts and mixing them with procedural questions; or, they may simply deal with more cases where the class of topics involved merit circumstances integrally related to exhaustion questions.

The preliminary consideration of the merits of a case before the discussion of exhaustion questions is tantamount to a mere breach of formality in most cases.[99] When this occurs, either the factors favoring the exhaustion issue are unpersuasive or the question is so minor that placement of the exhaustion issue doesn't matter. Although purists may feel affronted by the act of putting the cart before the horse,[100] there is little practical difference in the result. In fact, this strategy has

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[99]The rigid application of the is more appropriate in traditional regulatory settings, rather than in IEP reviews.

[100]Id.

certain advantages in highlighting the meatier substantive issues in front of exhaustion questions which are clearly settled on the plaintiff's side; it may also serve toward putting exhaustion questions in better perspective, or in illuminating a particular related point.

It is reasonable to expect that when merits of a case are discussed first, plaintiffs will inevitably be exempted from administrative exhaustion requirements. To do otherwise would often mean telling the plaintiff that he was right, but justice would have to be delayed or denied. For example, in the often quoted selective service case of McKart v. United States,[101] the Supreme Court held for the petitioner on the central point of whether he was exempt from military service as a sole surviving son before holding that his failure to appeal to the local draft board did not bar judicial review. If the petitioner in McKart had won on merits but lost on exhaustion, the result could have been imprisonment.[102]

There may be times, however, when a court requiring exhaustion of administrative remedies has chosen to discuss merits as a way of influencing the administrative decision-making

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[101]395 U.S. 185(1969).

[102]Id at 192.

process.[103] This may be particularly true in cases where agency expertise is important, but the court is unsure of the good faith of the hearing officers to arrive at what the court feels is a minimally appropriate result. This is a stronger breach of the exhaustion doctrine than merely the structuring of an opinion, for it interjects judicial influence into administrative proceedings. Yet it also works in favor of judicial economy by limiting the likelihood for appeal, since both parties are aware how the court would settle certain issues ahead of time. It also reveals the depth of discretionary review in EHA cases.[104]

PART IV. CONCLUSION

Plaintiff attorneys can profit from observing the exhaustion law patterns found in EHA cases, and in taking comfort in the fact that three out of every five EHA cases receive exemption from exhaustion requirements. For example, challenges which are

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[103]e.g., in Williams v. Overturf, 580 F. Supp. 1365(W.D. Wis. 1984), after requiring administrative exhaustion, the court stated that even is no exhaustion requirements existed in the case, it would side with the SEA decision already rendered. Id, 1370-1.

[104]Phipps v. New Hanover County Board of Education, supra note 85.

structured to argue legal issues and gross misconduct are more likely to gain access than issues tied to the discretion or expertise of educators. Similarly, class action suits are more likely to be exempted from exhaustion requirements, since EHA hearings are primarily designed to handle individual claims. The chances of being exempted from administrative exhaustion requirements are also improved by giving the EHA hearing process at least some opportunity to resolve complaints, or demonstrate its inability to do so. And attorneys should keep in mind that merits of the case often play a more important role in courts deciding exhaustion questions than the strict Doctrine of Exhaustion of Administrative Remedies recognizes.

The past writing patterns of judges in EHA opinions, however, have raised at least one red flag: Overly-brief opinions written for cases that win exemption from administrative exhaustion requirements. There were temptations to gloss over explanations of what seems a clear decision, particularly in cases where the exhaustion doctrine arguably never applied in the first place. Yet lawyers are sometimes short-changed as a result when they try to understand the broader meanings behind the cases.

On a more positive note, earlier EHA case law was examined in more detail in many cases where administrative exhaustion was

required, resulting in better for other courts to follow. This runs contrary to Davis observation that courts generally write ad hoc opinions on exhaustion issues with little consideration of their value in setting precedence.[105]

The role of merits of the case in deciding administrative exhaustion questions is perhaps the most intriguing of all parts of this study. While traditional exhaustion law forbids the consideration of merits of the case prior to deciding whether to admit a case, the very issues handled in many EHA cases implies that merits of the case often constituted an integral, inseparable part of the decision-making process. The picture of exhaustion law is not so much one of a sterile doctrine void of case merit influence, but rather more like a balancing act with many influencing factors.

The development of EHA case law presents a picture of the exhaustion doctrine as an evolving, generally predictable guide that becomes more valuable as case law in subject-specific areas develop. Stare decisis borrowed from subject areas outside of the EHA experience was more important in the early years of EHA exhaustion law development, but its influence decreased as EHA

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[105]"The courts do not usually write opinions designed to guide future determination of similar questions. Some exhaustion opinions are carefully reasoned, but most are not. Each decision tends to be ad hoc. Stare decisis is especially weak on problems of exhaustion." Davis, supra note 3, p. 415.

case law developed. In the complicated issue-rich working environment of EHA disputes, courts have responded with a liberal "open door" policy that admits a majority of complainants seeking early entry.

APPENDIX A. CASES USED IN SURVEY

Cases in Alphabetical Order

Abney by Kantor v. D.C., 849 F. 2d 1491(D.C. Cir. 1988)

Alban v. Bd. of Ed. of Harford Cty., 494 A. 2d 745(Md. App. 1985)

Allstate Ins. Co. v. Bethleham Area Sch. Dist., 676 F. Supp. 1132(E.D. Pa. 1987)

Andre H. v. Ambach, 104 F.R.D 606(S.D.N.Y. 1985)

Antkowiak by Antkowiak v. Ambach, 621 F. Supp. 975(D.C.N.Y. 1985)

Armstrong v. Kline, 476 F. Supp. 583(E.D. Pa. 1979)

Assn. for Rtd. Citizens in Col. v. Frazier, 517 F. Supp. 105(D. Col. 1981)

Assn. for Rtd. Citizens of Ala. v. Teague, EHLR DEC. 559:206(11th Cir. 1987)

Banta v. D.C., EHLR 441:237(D.D.C. 1988)

Brandon E. v. Wisconsin DPI, 595 F. Supp. 740(E.D. Wis.1984)

Calhoun v. Ill. State Bd. of Ed., 550 F. Supp. 796(N.D. Ill. E.D. 1982)

Catlin v. Ambach, 644 F. Supp. 161(N.D.N.Y. 1986)

Christopher T. v. San Francisco U. Sch. Dist., 553 F. Supp. 1107(N.D. Cal. 1982)

Cluff v. Johnson City Central Sch. Dist., 3 EHLR 553:598(N.D.N.Y. 1982)

Colin K. v. Schmidt, 536 F. Supp. 1375(D.R.I. 1982)

Cox v. Brown, 498 F. Supp. 823(D.D.C. 1980)

Crawford v. Pittman, 708 F. 2d. 1028(5th Cir. 1983)

Daniel B. v. Wis. Dept. of Public Instruction, 581 F. Supp. 585(E.D. Wis. 1984)

Davenport v. Rockbridge Cty. Sch. Bd., 658 F. Supp. 132(W.D. Vir. 1987)

Davis v. D.C. Bd. of Ed., 522 F. Supp. 1102(D.D.C. 1981)

Davis v. Maine Endwell Central School Dist., 542 F. Supp. 1257(N.D.N.Y. 1982)

Devries v. Fairfax Cty. Sch. Bd., EHLR DEC. 559:271(4th Cir. 1987)

Devries v.Spillane, 853 F. 2d 264(4th Cir. 1988)

Diamond v. McKenzie, 602 F. Supp. 632(D.D.C. 1985)

Dima v. Macchiarola, 513 F. Supp. 565(E.D.N.Y. 1981)

Doe by Gonzales v. Maher, 782 F. 2d 1470(9th Cir. 1986)

Doe v. Anrig, 50 F. Supp. 802(D. Mass. 1980)

Doe v. Belleville Publ. Sch. Dist., 672 F. Supp. 342(S.D. Ill. 1987)

Doe v. Bd. of Public Ed. of Nashville-Davidson Cty., EHLR 441:108(1988)

Doe v. Koger, 480 F. Supp. 225(N.D. Ind. 1979)

Doe v. Rockingham School Bd., 658 F. Supp. 403(W.D. Vir. 1987)

Drohan v. Drohan, 556 EHLR 207(N.D.N.Y. 1984)

Dubois v. Conn. St. Bd. of Ed., 727 F. 2d. 44(2d Cir. 1984)

Ely v. Howard County Bd. of Ed., 3 EHLR 553:288(N.J. Sup. L. 1982)

Esther C. v. Ambach, EHLR 441:231(1988)

Ezratty v. Comm. of P.R., 648 F. 2d 771(1st Cir. 1981)

Fallon v. Scotch Plains-Fanwood Bd. of Ed., 447 A. 2d 607(N.J. Super. L. 1982)

Foster v. D.C. Bd. of Ed., 523 F. Supp. 1142(D.D.C. 1981)

Garrity v. Gallen, 522 F. Supp. 171(D. N.H. 1981)

Gary B. v. Cronin, 542 F. Supp. 102(E.D. Ill. 1982)

Georgia Assn. of Rtd. Citizens v. McDaniel, 716 F. 2d 1565(11th Cir. 1983)

H.R. v. Hornbeck, 524 F. Supp. 215(D. Md. 1981)

Hark v. Sch. Dist. of Philadelphia, 505 F. Supp.727(1980)

Harris v. Campbell, 472 F. Supp. 51(E.D. Vir. 1979)

Hayes v. U. Sch. Dist. 377, EHLR DEC. 559:249(D. Kan. 1987)

Holmes v. D.C., 680 F. Supp. 40(D.D.C. 1988)

Hurry v. Jones, 560 F. Supp. 500(D. R.I. 1983)

In Re Laurie B., 489 A. 2d 567(N.H. Sup. Ct. 1984)

J.G. v. Bd. of Ed. of Rochester City Sch. Dist., 648 F. Supp. 1452(W.D.N.Y. 1986)

Kerr Ctr. Parents Assn. v. Charles, 572 F. Supp. 448(D. Ore. 1983)

Larry P. v. Riles, 495 F. Supp. 926(N.D. Cal. 1979)

Laura V. v. Providence Sch. Bd., 680 F. Supp. 66(D.R.I. 1988)

Lombardi v. Ambach, 522 F. Supp. 867(E.D.N.Y. 1981)

Loughran v. Flanders, 470 F. Supp. 110(D. Conn. 1979)

M.R. v. Milwaukee Public Schools., 584 F. Supp. 767(E.D. Wis. 1984)

Matthews v. Ambach, 552 F. Supp. 1273(W.D.N.Y. 1982)

Max M. v. Thompson, 585 F. Supp. 317(N.D. Ill. 1984)

McGovern v. Sullins, 676 F. 2d 98(4th Cir. 1982)

Medley v. Ginsberg, 492 F. Supp. 1294(S.D. W. Vir. 1980)

Mitchell v. Walter, 538 F. Supp. 1111(S.D. Ohio 1982)

Monahan v. State of Neb., 645 F. 2d 592(11th Cir. 1981)

Monahan v. State of Neb., 687 F. 2d 1165(11th Cir. 1982)

Monahan v. State of Neb., 491 F. Supp. 1074(D. Neb. 1980)

Mrs. W. v. Tirozzi, 832 F. 2d 748(2d Cir. 1987)

Muth v. Smith, 646 F. Supp. 280(E.D. Pa. 1986)

North v. D.C. Bd. of Education, 471 F. Supp. 136(D.D.C. 1979)

Parks v. Pavkovic, 536 F. Supp. 296(N.D. Ill. 1982)

People of State of Col. v. In the Interst of J.L.L., EHLR 559:269(Col. App. 1987)

Phipps v. New Hanover Bd. of Ed., 554 F. Supp. 732(E.D. N.C. 1982)

Quackenbush v. Johnson City Sch. Dist., 716 F. 2d 141(2d Cir. 1983)

Riley v. Ambach, 668 F. 2d 635(2d Cir. 1981)

Riley v. Ambach, 3 EHLR 551:668(E.D.N.Y. 1980)

Robertson v. Granite City Sch. Dist., 684 F. Supp. 1002(S.D. Ill. 1988)

Robideau v. S, Colonie Central Sch. Dist., 487 NYS 2d 696(N.Y. S. Ct. 1985)

Robinson v. Pinderhughes, 810 F. 2d. 1270(4th Cir. 1987)

Ruth Anne M. v. Alvin Ind. Sch. Dist., 532 F. Supp. 460(S.D. Tex. 1982)

Schobert v. Marcase, 428 A. 2d. 739(Comm. Pa. 1981)

Scruggs v. Campbell, 630 F. 2d 237(4th Cir. 1980)

Secor v. Richmond Sch., 689 F. Supp. 869(1988)

Seleyo v. Drury, 508 F. Supp. 122(S.D. Ohio 1980)

Sessions v. Livingston Parish Sch. Bd., 501 F. Supp. 251(M.D. La. 1980)

Shannon v. Ambach, 3 EHLR 553:198(E.D.N.Y. 1981)

Sherry v. NYS Bd. of Ed., 479 F. Supp. 1328(W.D.N.Y. 1979)

Sidney K. v. Ambach, EHLR 441:230(
1988)

Smith v. Ambach, EHLR 552:490(W.D.N.Y. 1981)

St. Louis Developmental Disabilities Treatment Ctr. Mallory, 591 F. Supp. 1416(W.D. Mo. 1984)

Stanger v. Ambach, 501 F. Supp. 1237(S.D.N.Y. 1980)

Timms v. Metro. Sch. Dist. of Wabash Cty., 722 F. 2d 1310(7th Cir. 1983)

Timothy W. v. Rochester Sch. Dist., EHLR 558:417(D.N.H. 1987)

Vermont Assn. for Lrning Dis. v. Kaagan, EHLR 554:447(D. Vt. 1983)

Weesner v. Baker by Baker, 477 N.E. 2d 337(Ind. App. 2d.1985)

White v. State of California, EHLR 559:191(Cal. App. 3d. 1987)

Williams v. Overturf, 580 F. Supp. 1365(W.D. Wis. 1984)

Wilson v. Marana U. Sch. Dist., 735 F. 2d 1178(9th Cir. 1984)

Winfield v. Sch. Bd. of Fairfax Cty., EHLR 551:269(Cir. Ct. Vir. 1979)

APPENDIX B. SAMPLE SURVEY FORM

entry:

CASE:

Appearance: Size: Facts:

b= beginning f=facts 1= para. 2=2 para

m= middle 10=page

p=prodedural 1st

ma=merits discussed after E. required

Implied: lowerct: merits:
meritdiscussed:

c=clear u= upheld (When ct.
specifically
i=impied r= reversed talks of
merits)
na=not appl. p=upheld in part

premature

a=avoided by agreement

MNote:

Request: LEA: SEA: Repeat:

w=withdrew

Year: St.: Cir.: Cite:

Class: type: Check: Result:

GV: m=modified, 1983 action gets same access

Note:

Futility: IR: IREP I: EHA inaappl.: Hold jurs:
Ind. Ex.:
Other:

Policy: Procedure: law: Reg:

Placement: Treatment: transfer: Suspend:

Timeliness: Inaction: Evaluation: Pre deter:

Reimburse: damages: Negligence: WhenExhaust:

Notice:

ED: RHA: Civil: Eleventh: Fourteenth:

Art. 3: Other law:

counter:

Number of req:

Number of Prede:

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